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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 261

CANAVERAL PORT AUTHORITY,
Petitioner,

vs.

1329.25 ACRES OF LAND, MORE OR LESS, IN BREVARD COUNTY, FLORIDA; PORT REALTY COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Canaveral Port Authority, by its undersigned attorney, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida, entered in the above cause on May 26, 1950, affirming the judgment of the Circuit Court, Ninth Judicial Circuit of the State of Florida, in and for Brevard County, Florida, in a proceeding in eminent domain brought by Canaveral Port Authority, a State governmental instrumentality and body corporate and politic, created under the provisions of Chapter 19716, Laws of Florida, Acts of 1939, as the governing authority of Canaveral Port District thereby created in Brevard County, Florida, to acquire the fee simple title to certain fast lands and to confirm its fee simple title to certain

submerged lands lying below high water mark of the Banana River, a stream navigable in fact, as theretofore acquired from the State of Florida by deed of conveyance executed and delivered by said State acting by and through the Trustees of the Internal Improvement Fund of the State of Florida in connection with the establishment within said Banana River of a deep water sea harbor and port and appurtenances thereto.

Opinions Below

The said Circuit Court's final judgment entered on August 26, 1949, is not reported but is to be found at R. 62. Only adjudication of Paragraphs numbered 24 and 25 is here involved. (R. 59) The opinion of the Supreme Court of the State of Florida (R. 68) is reported in 46 So. (2d) 611.

Jurisdiction

The judgment of the Supreme Court of the State of Florida was entered May 26, 1950 (R. 68). The jurisdiction of this Court is involved under the provisions of Title 28, U. S. C. A., Section 1257.

Questions Presented

As will be noted below, there are two questions here involved. As to the appellee owners, Elizabeth Holmes and Elliott M. Burns, in whose favor severally the said Circuit Court rendered awards against Canaveral Port Authority by its heretofore indicated Final Judgment (R. 47), pursuant to adjudicating Paragraphs 24 and 25 (R. 59) thereof, the questions here presented are identical.

The questions so presented are:

1. ARE RIPARIAN RIGHTS APPURTENANT TO UPLAND FAST LANDS TERMINATED AND ENDED BY A CONVEYANCE BY

THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA OF THE SUBMERGED LANDS IN THE BED OF A NAVIGABLE STREAM FROM THE HIGH WATER MARK OF SAID STREAM OUTWARD TO A GRANTEE NOT THE OWNER OF THE UPLAND PROPERTY?

2. IS A STATE GOVERNMENTAL INSTRUMENTALITY ENGAGED IN A PUBLIC PROJECT IN AID OF COMMERCE AND NAVIGATION IN THE BED OF A NAVIGABLE STREAM REQUIRED TO MAKE COMPENSATION TO THE OWNER OF THE UNINVADED UPLAND TO THE EXTENT OF THE DEPRECIATION IN THE VALUE THEREOF ARISING FROM THE DESTRUCTION OF THE RIPARIAN RIGHTS FORMERLY APPERTAINING TO THE UNINVADED UPLAND AS THE PROXIMATE RESULT OF THE PERFORMANCE OF SAID PUBLIC PROJECT?

Federal Question Involved

As to both questions here involved the identical Federal question is present.

The Constitution of 1886 of the State of Florida now in force and effect contains two provisions concerning compensation for the taking of private property for public use, namely, Section 12 of the Bill of Rights and Section 29, Article XVI of said Constitution. No other constitutional or statutory provisions of the State of Florida exist as a support for the before indicated awards against Canaveral Port Authority here complained of. As will appear from the statement included herein below neither of the referred to Florida Constitutional provisions are applicable in the premises and hence the awards severally made by the said Circuit Court by adjudicating Paragraphs numbered 24 and 25 (R. 59) of its said final judgment of August 26, 1949, as affirmed by the Supreme Court of Florida by its opinion and judgment rendered on May 26, 1950 (R. 68), 46 So. (2d) 611, constitute and are adjudications against Canaveral Port Authority in denial of an equal protection of the laws as guaranteed unto it by the 14th Amendment to the Constitution of the United States.

Statement

Canaveral Port Authority, for the purpose of aiding commerce and navigation in the Banana River on a cost sharing basis with the United States, acting under the Rivers and Harbors Act of Congress, approved March 2, 1945, as Public Law No. 14, 79th Congress, First Session, in accordance with a project set forth in House Document No. 367 of the 77th Congress, First Session undertook as a part of its contribution to the joint enterprise with the United States, to acquire in its name by eminent domain the fee title to two areas of property in Brevard County, Florida, situate within Canaveral Port District. One such area is located on Merritt Island and is not here involved. The other area lies on the ocean barrier between the Atlantic Ocean and the Banana River with a part of this area extending westward from the eastern meander or high water mark of the river into the submerged bed thereof.

As different portions of the area so sought were owned by separate entities Canaveral Port Authority in its Petition for Condemnation separated the area of fast and submerged lands under acquisition into separate ownership parcels which were numerically designated (R. 1).

Parcel No. 20 legally described the entire area of submerged lands involved in the proceedings and with respect thereto the Petition alleged Canaveral Port Authority to be vested with and in possession of the fee simple title thereto, subject only to the claims of unknown persons.

The indicated proceedings insofar as the submerged lands, Parcel No. 20, were concerned merely sought a judicial confirmation of the fee simple title thereto acquired by Canaveral Port Authority prior to the institution of the proceedings under conveyances from the State of Florida to Canaveral Port Authority, which at the trial were admitted in evidence without objection from any source as Peti-

tioner's Exhibits 31 and 32 (R. 31-34). No adverse claim as against Parcel No. 20 was asserted by anyone at the trial of said cause and said Circuit Court confirmed said title by adjudicating a nominal award for said unknown claimants (R. 58).

The east boundary of the submerged lands, Parcel No. 20, is the meander or high water mark of the Banana River and from the northeast corner of said submerged lands running southward for a distance of 200 feet it is contiguous to the west boundary line of Lot 1 of Reeds Subdivision. Extending southward for a further distance of 153.4 feet it is contiguous to the west boundary of the North 153.4 feet of Lot 2 of Reeds Subdivision. Petitioner's Exhibit No. 1 (R. 24-A).

Both Lot 1 and the North 153.4 feet of Lot 2 of Reeds Subdivision were entirely uninvaded by Canaveral Port Authority's proceeding in eminent domain. The west boundary line of both the indicated properties is, however, contiguous to the east boundary of the area under acquisition.

The Appellee, Elizabeth Holmes, owns said Lot 1 and the Appellee, Elliott M. Burns, owns said North 153.4 feet of said Lot 2, both of Reeds Subdivision.

Both Appellees became defendants to the proceedings by reason of ownerships held by them that lay within the perimeter area of the lands under acquisition. Neither appellee, as the owner of the contiguous but uninvaded lands before referred to, took any action to intervene in said proceedings as the owners of said contiguous lands nor did they present any pleading by way of answer to the Petition, or otherwise, asserting any right to compensation in said proceedings from said Canaveral Port Authority with respect to the aforesaid Reeds Subdivision properties. Yet at the trial of said cause before said Circuit Court that Court held as a matter of law that said Appellees, severally, as the

owners of said contiguous properties before referred to were entitled to be compensated to the extent that said contiguous properties would be diminished in market value by thereafter being deprived of the riparian rights formerly appertaining thereto. The said Circuit Court then held as a matter of law that riparian rights were property rights which could not be taken without compensation being made therefor (R. 22). The final judgment of August 26, 1949, resulted from such holding and on Appeal by Canaveral Port Authority the same was affirmed.

Reasons for Granting the Writ

1. In Florida private ownership of property extends only to the meander or high water mark of a stream or other body of water, whether fresh or salt, that is navigable in fact. *Rivas* v. *Solary*, 18 Fla. 122; *Ruge* v. *Apalachicola Oyster Canning & Fish Co.*, 25 Fla. 656, 6 So. 489; *State* v. *Black River Phosphate Company*, 27 Fla. 276, 9 So. 205; *State* v. *Gerbing*, 56 Fla. 603, 47 So. 353; *Ferry Pass Inspectors' & Shippers' Ass'n* v. *White's River Inspectors' & Shippers' Ass'n*, 57 Fla. 399, 48 So. 643; *Bass* v. *Ramp*, 58 Fla. 161, 50 So. 945; *Broward* v. *Mabry*, 58 Fla. 398, 50 So. 826; *Merrill-Stevens Co.* v. *Durkee*, 62 Fla. 549, 57 So. 428; *Clements* v. *Watson*, 63 Fla. 109, 58 So. 25; *Symmes* v. *Praire Public Phosphate Company*, 64 Fla. 480, 60 So. 223; *Ex parte Powell*, 70 Fla. 363, 70 So. 392; *Panama Ice & Fish Co.* v. *Atlanta & St. A. B. Ry. Co.*, 71 Fla. 419, 70 So. 608; *Thiesen* v. *Gulf, F. & A. Ry. Co.*, 75 Fla. 28, 78 So. 491; *Brickell* v. *Trammel*, 77 Fla. 544, 82 So. 221; *City of Tarpon Springs* v. *Smith*, 81 Fla. 479, 88 So. 613; *Tampa Southern R. Co.* v. *Nettles*, 82 Fla. 2, 89 So. 223; *Apalachicola Land & Development Co.* v. *McRae*, 86 Fla. 393, 98 So. 505; *State* v. *City of Tampa*, 88 Fla. 196, 102 So. 274; *Martin* v. *Busch*, 93 Fla. 535, 112 So. 274; *Freed* v. *Miami Beach Pier Corp.*, 93 Fla. 888, 112 So. 841, 52 A. L. R. 1177; *Deering* v. *Martin*,

95 Fla. 259, 116 So. 54; *Lipscomb* v. *Gailourakis,* 101 Fla. 1130, 133 So. 104; *State ex rel Landis* v. *Rosenthal,* 109 Fla. 363, 148 So. 769; *Perky Properties, Inc.* v. *Felton,* 113 Fla. 432, 151 So. 892; *Hicks* v. *State, ex rel Landis,* 116 Fla. 603, 156 So. 603; *Adams* v. *Elliott,* 128 Fla. 79, 174 So. 731; *White* v. *Hughes,* 139 Fla. 54, 190 So. 446; *Caples* v. *Taliferro,* 144 Fla. 1, 197 So. 861.

No question exists that the Banana River is a stream navigable in fact.

The State of Florida holding the title to lands under the navigable waters of the Banana River in trust for the people of the State that they might enjoy the navigation of the waters thereof, and carry on commerce over them, *Hicks* v. *State ex rel. Landis,* 116 Fla. 603, 156 So. 603, brought about the creation of Canaveral Port Authority as a body corporate and body politic by the enactment of Chapter 19716, Laws of Florida, Acts of 1939 and did thereby confer upon Canaveral Port Authority the privileges, prerogatives, powers, duties and responsibilities there set forth and as now amended, supplemented and added to by Chapter 21139, Laws of Florida, Acts of 1941; Chapter 23199, Laws of Florida, Acts of 1945; Chapter 24403, Laws of Florida, Acts of 1947; Chapter 24996, Laws of Florida, Extraordinary Session of 1948; and Chapters 25700 and 25707, Laws of Florida, Acts of 1949, one of which said duties was to improve commerce and navigation within the Port District as there defined either alone or in conjunction with the United States. (Note: The project is actually being performed at the joint expense of Canaveral Port Authority and the United States, the latter acting under the Rivers and Harbors Act of Congress approved March 2, 1945, as Public Law No. 14, 79th Congress, First Session, in accordance with a project set forth in House Document No. 367 of the 77th Congress, First Session.)

On August 31, 1945, in accordance with the provisions and procedure provided for in Section 253.13, Florida Statutes, the State of Florida, acting by and through its Trustees of the Internal Improvement Fund of the State of Florida, pursuant to the authority conferred upon said Trustees by Section 253.12, Florida Statutes, did convey to Canaveral Port Authority that portion of the submerged bed of the Banana River lying immediately westward of and contiguous to the aforesaid Lot 1 and the North 153.4 feet of Lot 2, Reeds Subdivision, owned respectively by the Appellees, Elizabeth Holmes and Elliott M. Burns, severally. The deed just referred to is Petitioner's Exhibit No. 32 (R. 33) and coupled with Petitioner's Exhibit No. 31 (R. 31) describes all the land embraced within the aforesaid Parcel No. 20. The area conveyed by said Petitioner's Exhibit No. 32 covers the area within which the riparian rights appertaining to both of the properties in Reeds Subdivision before noted are situated.

At no time prior to or after the execution of the aforesaid State deed to Canaveral Port Authority on August 31, 1945, did either of the Appellees as owners of the indicated upland fast lands undertake to preserve their riparian rights within the area so conveyed as they were privileged and authorized to do under the provisions of and within the time prescribed by Section 253.14, Florida Statutes.

Consequently, at the time of the institution of the eminent domain proceedings on January 19, 1949 (R. 1), a date long after the expiration of the privileges granted by said Section 253.14, Florida Statutes, neither one of the uninvaded upland properties in said Reeds Subdivision here involved was impressed with appurtenant riparian rights.

Such being the situation, no interest was taken by Canaveral Port Authority as to either property in said Reeds

Subdivision for which a right to be compensated arose in favor of either the Appellee, Elizabeth Holmes, as the owner of the contiguous but uninvaded Lot 1 of Reeds Subdivision, or the Appellee, Elliott M. Burns, as the owner of the contiguous but uninvaded North 153.4 feet of Lot 2 of Reeds Subdivision under either said Section 12 of the Bill of Rights or Section 29, Article XVI of the Constitution of the State of Florida.

The foregoing was utterly ignored by the Supreme Court of Florida in rendering its opinion and judgment on May 26, 1950, here sought to be reviewed.

2. It specifically appearing from these proceedings that the project in which Canaveral Port Authority is engaged is one in aid of commerce and navigation (R. 2), the Supreme Court of Florida failed to recognize that even if appurtenant riparian rights did in fact exist with respect to the uninvaded uplands of the Appellees, Elizabeth Holmes and Elliott M. Burns (which under Reason Number 1 has been shown did not exist at the time of the institution of these proceedings on January 19, 1949), that yet the owners of such uninvaded uplands as are here present were not entitled to any compensation computed as either (a) the direct value of such riparian rights, or (b) as the diminishment in the market value of the uninvaded uplands arrived at by measuring the value of such riparian rights, for private riparian rights are ownerships subordinate to the title of the sovereign state or its instrumentality, one of the primary lawful exercises of which said sovereign ownership is to engage in projects in aid of commerce or navigation for the benefit of the public generally. This lawful exercise being paramount to any mere private property right gives rise to no constitutional right of compensation either under the State or the Federal Constitutions in instances where the private right is dam-

aged, altered or destroyed by the lawful exercise of the plenary sovereign right and duty to engage in projects in aid of commerce and navigation within the beds of streams navigable in fact.

It is well settled that where the United States engages in such a project under the constitutional servitude attached as a mere appurtenant to the sovereign title of the State under the commerce clause of the Constitution of the United States, no right of compensation under the 5th Amendment, or otherwise, accrues against it and in favor of the owner of a private riparian right such as the Appellees here. South Carolina v. Georgia, 93 U.S. 4; Shively v. Bowlby, 152 U.S. 1; Scranton v. Wheeler, 179 U.S. 141, 163; Gibson v. United States, 166 U.S. 269, 275-276; United States v. Chandler-Dunbar W. P. Co., 229 U.S. 53; Bailey v. United States, 62 C. Cls. 77, certiorari denied, 273 U.S. 751; United States v. Chicago, M. St. P. & P. R. R. Company, 312 U.S. 592, 596-597, and cases there cited, and United States v. Commodores Park, Inc., 324 U.S. 386 and cases there cited.

The Supreme Court of Florida has recognized that the constitutional delegation of powers by the States to the general government are not exclusive of the continued exercise, in fact the continued duty to continue itself, or through its local state agencies, to exercise the power so delegated to the general government so long as such exercise is not in conflict with the delegated servitude enjoyed by the United States. Stockton v. Powell, 29 Fla. 1, 10 So. 688, 15 L.R.A. 42; State v. Gordon, 138 Fla. 312, 189 So. 437. And the Supreme Court of the United States has long recognized the plenary power of a state to continue to exercise a power delegated to the general government by the United States Constitution. Wilson v. Marsh Co., 2 Pet. 245; Gilman v. Philadelphia, 3 Wall.

713; Pound v. Turck, 95 U.S. 459; Davidson v. New Orleans, 96 U.S. 107; Mobile Co. v. Kimball, 102 U.S. 691; Escamba & L. M. Transportation v. Chicago, 107 U.S. 678; Hagan v. Reclamation District, 111 U.S. 701; Cardwell v. Bridge Co., 113 U.S. 205; Hamilton v. Railroad Co., 119 U.S. 280; and Bridge Co. v. Hatch, 125 U.S. 1.

The decision of the Supreme Court of Florida as sought to be reviewed is in direct conflict with the decisions of the Supreme Court of the United States in like cases, and the judgment making an award against Canaveral Port Authority and in favor of the Appellees hereinbefore named is an unlawful, capricious award unsupported and unauthorized by any Constitutional or statutory mandate of the State of Florida.

Conclusion

For the foregoing reasons it is respectfully submitted that the Petition for a writ of certiorari should be granted.

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